COPY

Supreme Court, U.S.
FILED

No. 98 433 SEP 10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

W.A. MERKLE, Warden, *Petitioner*,

v.

CLYDE EDWIN SEIDEL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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53 pp.

QUESTIONS PRESENTED

1. May a state inmate receive a federal evidentiary hearing on a claim of ineffective assistance of counsel and present evidence never alleged as the basis for the claim in the state court, where the state afforded the inmate a full and fair hearing on his federal claim?

2. Does a ruling by the Ninth Circuit Court of Appeals circumvent the holding of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), relieving the state inmate from his burden to demonstrate cause and prejudice from his failure to develop a material fact in the state court proceedings?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	7
ARGUMENT	8
SINCE THE STATE PROVIDED SEIDEL WITH A FULL AND FAIR HEARING ON HIS FEDERAL CLAIMS, SEIDEL WAS NOT ENTITLED TO A FEDERAL EVIDENTIARY HEARING TO DEVELOP MATERIAL FACTS NEVER PRESENTED TO THE STATE COURTS ABSENT CAUSE AND PREJUDICE SHOWINGS FOR HIS FAILURE	8
A. Factual Background	9

TABLE OF CONTENTS, CONT'D

B. Because Seidel Did Not Show Cause For His Failure To Develop The Record In State Court And Actual Prejudice From His Failure, The District Court And Court Of Appeals Erred In Allowing Seidel To Conduct An Evidentiary Hearing 10

C. The Ninth Circuit Incorrectly Concluded That Under These Facts, The District Court Retained Discretion To Order An Evidentiary Hearing *Sua Sponte* 14

CONCLUSION 16

TABLE OF AUTHORITIES

	Page
Cases	
Burden v. Zant 498 U.S. 433 (1991)	15
Clemmons v. Delo 124 F.3d 944 (8th Cir. 1997)	7
Fay v. Noia 372 U.S. 391 (1963)	11
Keeney v. Tamayo-Reyes 504 U.S. 1 (1992)	i, 5-8, 10-14
Lindh v. Murphy 521 U.S. 320 117 S. Ct. 2059 138 L. Ed. 2d 481 (1997)	3
Lonchar v. Thomas 517 U.S. 314 116 S. Ct. 1293 134 L. Ed. 2d 440 (1996)	8
Mathis v. Zant 975 F.2d 1493 (11th Cir. 1992)	7, 13
McCleskey v. Zant 499 U.S. 467 111 S. Ct. 1454 113 L. Ed. 2d 517 (1991)	8

TABLE OF AUTHORITIES, CONT'D

Mitchell v. Rees
114 F.3d 571 (6th Cir. 1997)
cert. denied, 118 S. Ct. 1062 (1998) 7, 13

Murray v. Carrier
477 U.S. 478 (1986) 9

Pagan v. Keane
984 F.2d 61 (2d Cir. 1993) 7

Seidel v. Merkle
146 F.3d 750 (9th Cir. 1998) 1, 6

Stone v. Powell
428 U.S. 465 (1976) 11

Sumner v. Mata
449 U.S. 539 (1981) 13, 15

Sumner v. Mata
455 U.S. 591 (1982) 15

Townsend v. Sain
372 U.S. 293 (1963) 8, 9, 11, 12, 14

Constitutional Provisions

United States Constitution
Article VI, clause 2 2
Tenth Amendment 2

TABLE OF AUTHORITIES, CONT'D

Statutes

28 United States Code
§ 1254(1) 1
§ 2254 2, 5, 12
§ 2254(d) 3, 8, 13, 15

California Penal Code
§ 187 5
§ 1181(6) 9
§ 2254(d) 13
§ 12022(b) 5

Court Rules

Supreme Court Rules
Rule 10(a) 1
Rule 10(c) 1

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No.

W.A. MERKLE, Warden, *Petitioner*,

v.

CLYDE EDWIN SEIDEL, *Respondent*.

W.A. Merkle, Warden of the California Correctional Center at Susanville, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Seidel v. Merkle*, 146 F.3d 750 (9th Cir. 1998). A copy of that decision is attached to this petition as Appendix A. The order of the United States District Court for the Northern District of California that granted the petition for writ of habeas corpus is unreported and is reproduced and attached to this petition as Appendix B.

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rules 10(a) and (c). The

judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 20, 1998.

CONSTITUTIONS, STATUTES OR REGULATIONS

Article VI, clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 2254 provides in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Former 28 U.S.C. § 2254(d) (Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105-1106)[1] provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed in the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or

---

1. While the case was pending in the district court, 28 U.S.C. § 2254 was amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996). This Court has found, in part, that Congress did not intend for changes to 28 U.S.C. § 2254 to apply to cases pending in federal court on the date of enactment. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issues was made, pertinent to a determination of the sufficiency of the evidence to support such a factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the

burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

On October 2, 1990, a Humboldt County Superior Court jury convicted Seidel of second-degree murder and found that Seidel was armed with and used a deadly weapon. Cal. Pen. Code §§ 187, 12022(b). On November 22, 1991, the trial court sentenced Seidel to state prison for the term of fifteen years to life for murder and imposed a consecutive one-year term on the weapon-use enhancement.

On April 16, 1993, the state appellate court affirmed the judgment. On July 21, 1993, the California Supreme Court denied the petition for review.

On March 10, 1994, Seidel filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus in the district court.

On October 11, 1995, the district court held that "Seidel's petition for a writ of habeas corpus requires factual determinations that cannot be made on the pleadings," and referred the matter to a federal magistrate to conduct an evidentiary hearing on Seidel's allegations of ineffective assistance of state trial counsel. The State moved for reconsideration, arguing that *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), required Seidel to demonstrate cause and prejudice from his failure to develop material facts in the state courts. On October 26, 1995, the district court denied respondent's motion for reconsideration.

On November 15, 1996, the magistrate presided over an evidentiary hearing and later issued findings and conclusions.

The State filed objections to the magistrate's findings and conclusions. The State argued, in part, that

Keeney v. Tamayo-Reyes precluded a federal evidentiary hearing absent a cause and prejudice showing by Seidel and that the magistrate's finding and conclusions were irrelevant.

On March 27, 1997, the district court implicitly rejected respondent's argument by granting the petition for a writ of habeas corpus based on the evidence from the evidentiary hearing, and set aside the underlying murder conviction. *See* Appendix B.

On April 15, 1997, the State filed a notice of appeal in the Ninth Circuit Court of Appeals.

On July 20, 1998, the Ninth Circuit Court of Appeals affirmed the judgment of the district court. The court held that a federal habeas corpus petitioner does not have to establish cause and prejudice pursuant to *Keeney v. Tamayo-Reyes* for the district court to conduct an evidentiary hearing where the state provided petitioner with a full and fair hearing on his federal claim. *See* Appendix A; *Seidel v. Merkle*, 146 F.3d 750.

SUMMARY OF ARGUMENT

Federal Courts of Appeals disagree on the issue the California warden asks the Court to resolve: whether *Tamayo-Reyes* altered the discretionary power of federal district courts to order an evidentiary hearing where the state provided petitioner with a full and fair hearing on his federal claims, or must petitioner demonstrate cause and prejudice for his failure to develop material facts before earning the privilege of an evidentiary hearing. Compare *Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1062 (1998) (requiring a cause and prejudice showing), and *Mathis v. Zant*, 975 F.2d 1493, 1496-97 (11th Cir. 1992) (reversing where the court failed to require a cause a prejudice showing), with *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993) (the court retains discretion to order an evidentiary hearing), and *Clemmons v. Delo*, 124 F.3d 944, 951-52 (8th Cir. 1997) (*Tamayo-Reyes* addresses only the circumstances under which an evidentiary hearing is required). Because uniformity among federal courts is important on questions of this order, the State petitions this Court for certiorari to end the division of authority.

ARGUMENT

SINCE THE STATE PROVIDED SEIDEL WITH A FULL AND FAIR HEARING ON HIS FEDERAL CLAIMS, SEIDEL WAS NOT ENTITLED TO A FEDERAL EVIDENTIARY HEARING TO DEVELOP MATERIAL FACTS NEVER PRESENTED TO THE STATE COURTS ABSENT CAUSE AND PREJUDICE SHOWINGS FOR HIS FAILURE

Former 28 U.S.C. § 2254(d) is an express limitation on the district court's jurisdiction. A district court is without authority to hold an evidentiary hearing on factual issues on which the state court has made findings unless one of the factors contained in § 2254(d) applies. It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing.

Once a district court has properly determined that it may dispense with the presumption of correctness mandated by § 2254(d), the court has some discretion in determining whether to hold an evidentiary hearing. *See Lonchar v. Thomas*, 517 U.S. ___, ___, 116 S. Ct. 1293, 1300, 134 L. Ed. 2d 440 (1996) (citing Habeas Corpus Rule 8(a)); *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Keeney v. Tamayo-Reyes*, 504 U.S. at 11-12.

However, a habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Keeney*, 504 U.S. at 11-12 (citing *McCleskey v. Zant*, 499 U.S. 467, 111

S. Ct. 1454, 113 L. Ed. 2d 517 (1991); *Murray v. Carrier*, 477 U.S. 478, 496 (1986)) (overruling *Townsend* in part). Therefore, a district court abuses its discretion by ordering such an evidentiary hearing without first requiring the petitioner to make the requisite showing.

A. Factual Background

In the state trial court, defense counsel moved for a new trial on the ground that the jury's verdict was "contrary to law or evidence." In the alternative, counsel sought modification of the verdict to a lesser crime. Cal. Pen. Code § 1181(6). Following a hearing on November 5, 1990, the trial court denied the motion for new trial.

On November 9, 1990, the trial court relieved defense counsel. On November 21, 1990, the trial court appointed new counsel for post-conviction proceedings.

On August 9, 1991, Seidel filed a petition for writ of habeas corpus in the trial court. Alternatively, Seidel asked the trial court to consider the petition a motion for a new trial and a motion to modify the verdict.

In August 13, 1991, the trial court issued a writ and ordered respondent to show cause why a writ of habeas corpus should not issue.

On October 4, 1991, Seidel sought the appointment of a psychologist to assist counsel in the presentation of his ineffective assistance of counsel claims. On October 10, 1991, the trial court appointed a psychologist to assist the defense.

By separate applications on October 16, 1991, and November 19, 1991, counsel filed in support of the habeas corpus petition copies of defendant's military records and a psychological assessment.

On November 22, 1991, the trial court held a hearing on the defense motion for a new trial and the petition for writ of habeas corpus. Counsel stated that he

chose not to subpoena witnesses for the hearing and would rely on the psychologist's report, and the records and declarations filed in support of the petition. Thereafter, the parties argued the petition for writ of habeas corpus and the motion for new trial. The judge, who had observed the performance of Seidel's previous counsel at trial, considered all declarations, reports, and arguments. The trial court denied the petition for writ of habeas corpus, discharged the writ, and denied the motion for new trial.

On direct appeal to the California Court of Appeal, Seidel did not allege that the trial court denied him a full and fair hearing on his ineffective assistance of counsel claims. The petition for review to the California Supreme Court likewise failed to allege that the trial court denied Seidel a full and fair hearing on his ineffective assistance of counsel claims.

On this record, the district court, in ordering an evidentiary hearing, held that "Seidel's petition for a writ of habeas corpus requires factual determinations that cannot be made on the pleadings." The district court did not require Seidel to demonstrate cause and prejudice for his failure to develop the record in the state courts.

B. Because Seidel Did Not Show Cause For His Failure To Develop The Record In State Court And Actual Prejudice From His Failure, The District Court And Court Of Appeals Erred In Allowing Seidel To Conduct An Evidentiary Hearing

In *Tamayo-Reyes*, this Court determined the standard a federal court should use when deciding if a habeas petitioner should receive an evidentiary hearing after he failed to develop a material fact in the state court proceedings. Several years earlier, this Court had established six circumstances wherein a federal court must

grant a habeas corpus petitioner an evidentiary hearing, the fifth of which was when "the material facts were not developed at the state-court hearing." *Townsend v. Sain*, 372 U.S. at 313.[2] The *Townsend* court held that a habeas corpus petitioner would not be entitled to a hearing if his failure to develop the facts was attributable to his inexcusable neglect. *Townsend*, 372 U.S. at 317. The Court defined inexcusable neglect by pointing to the standard for procedural default in *Fay v. Noia*, 372 U.S. 391, 438-39 (1963), *overruled by Stone v. Powell*, 428 U.S. 465 (1976). *Townsend*, 372 U.S. at 317. *Fay* held that a court could find excusable neglect only where there was a deliberate bypass of the state court procedure. *Fay*, 372 U.S. at 438. The *Tamayo-Reyes* court held that since the *Fay* standard for procedural default had changed to a cause and prejudice standard, a federal court should apply the cause and prejudice standard to determine if a habeas petitioner should get an evidentiary hearing in federal court after he failed to develop a material fact in state court proceedings. *Tamayo-Reyes*, 504 U.S. at 5-12.

This Court emphasized that the adoption of a standard that encourages full factual development of a claim in state court "is fully consistent and gives meaning to the requirement of exhaustion." *Tamayo-Reyes*, 504 U.S. at 9. Noting that Congress had incorporated "[t]he requirement that state prisoners exhaust state remedies

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2. In *Townsend v. Sain*, 372 U.S. 293, the Court identified six circumstances in which an evidentiary hearing would be required: "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 313.

before a writ of habeas corpus is granted by a federal court" under 28 U.S.C. § 2254, this Court declared that "Congress surely meant that exhaustion be serious and meaningful." *Tamayo-Reyes*, 504 U.S. at 9-10. The Court went on to state:

> Comity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just as the state must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the state a full and fair opportunity to address and resolve the claim on the merits.

Id. at 10. The *Tamayo-Reyes* court partially overruled *Townsend*, addressing the availability of a hearing under the fifth circumstance. The court's analysis applies equally to all but the second of the remaining circumstances identified in *Townsend*, however. Necessarily, a finding that a hearing is required under the first, third, fourth, or sixth circumstances would, like the fifth circumstance at issue in *Tamayo-Reyes*, indicate that a petitioner had exhausted his state remedies only because his failure to fully and fairly present his state claim in state-court proceedings and receive a full and fair hearing thereon had resulted in a situation constituting either a partial or complete procedural default of the claim. Each of the circumstances listed in *Townsend*, with the exception of the second, describes a circumstance wherein a state prisoner has not exhausted his state remedies by way of a full factual development of his claim, a full and fair hearing in state court, followed by a determination of the merits of the claim. *See Keeney v. Tamayo-Reyes*, 504 U.S. at 8-10.[3] Instead, those circumstances indicate the

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3. Outside the context of a procedural default situation, a state

petitioner has failed to ensure that full factual development of his claim take place in state court, or that a state procedural bar prevents him from developing his claim.

Because Seidel did not show cause for his failure to develop the record in state court and actual prejudice from his failure, the district court erred in allowing Seidel to conduct an evidentiary hearing in federal court on his habeas corpus claims. The opinion of the Ninth Circuit Court of Appeals circumvents the clear holding of *Tamayo-Reyes*, and is inconsistent with at least two other circuit decisions. *See Mitchell v. Rees*, 114 F.3d 571, 577; *Mathis v. Zant*, 975 F.2d 1493, 1496-97.

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court's failure to afford a litigant an adequate and fair fact-finding procedure will likely occur only rarely as this Court has broadly defined a "determination on the merits of a factual issue": "[T]he California Court of Appeal made the factual determinations at issue here and it did so after a review of the trial court record. Nevertheless, it clearly held a 'hearing' within the meaning of § 2254(d). Both respondent and the State were formally before the court. Respondent was given an opportunity to be heard and his claim received plenary consideration even though he failed to raise it before the trial court. After respondent presented his case to the state appellate court, that court concluded in a written opinion that 'the facts of the present case' did not adequately support respondent's claim. Since that court was requested to determine the issue by respondent, we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d). . . . ¶ . . . Section 2254(d) by its terms thus applies to factual determinations made by state courts, whether the court be a trial court or an appellate court. [Citation.] This interest in federalism recognized by Congress in enacting § 2254(d) requires deference by federal courts to factual determinations of all state courts." *Sumner v. Mata*, 499 U.S. 539, 546-47 (1981).

C. The Ninth Circuit Incorrectly Concluded That Under These Facts, The District Court Retained Discretion To Order An Evidentiary Hearing *Sua Sponte*

Relying in part on Justice O'Connor's dissenting opinion in *Tamayo-Reyes*, the Ninth Circuit held that *Tamayo-Reyes* did not affect a district court's "broad authority" to consider any evidence relevant to a federal habeas petitioner's claim. *See* Appendix A at 7751-52; *see also Tamayo-Reyes*, 504 U.S. at 23 (O'Connor, J., dissenting) ("[T]he district courts . . . still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory.").

The Ninth Circuit opinion fails to recognize, however, the *Tamayo-Reyes* majority's direct response to the dissenter's view. In relevant part, the majority notes: "[¶] It is not surprising, then, that none of the cases cited by Justice O'Connor remotely support *Townsend*'s requirement for a hearing in any case where the 'material facts were not adequately developed at the state-court hearing' due to petitioner's own neglect. [*Townsend*,] 372 U.S., at 313." *Tamayo-Reyes*, 504 U.S. at 5-6 n. 2 (White, J., majority opn.).

Ours is such a case. Given every reasonable opportunity by the State to perfect his federal claim, Seidel produced a record the federal district court correctly found wanting. However, by relieving Seidel of his cause and prejudice burdens, the district court and the Ninth Circuit Court of Appeals defeated the concerns of finality, comity, judicial economy, exhaustion, and uniformity in governing of habeas corpus principles which this Court found decisive in *Tamayo-Reyes*, 504 U.S. at 8-10. The Ninth Circuit opinion effectively guts *Tamayo-Reyes*. It excuses Seidel's failure to develop material facts in the state-court proceedings with nary a thought either

to Seidel's cause and prejudice burdens or to the lack of deference given to the state court's findings made after a full and fair hearing. *See Sumner v. Mata*, 449 U.S. at 550-52; *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982); *Burden v. Zant*, 498 U.S. 433, 437 (1991) (*per curiam*) ("A habeas court may not disregard the presumption [of correctness] unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of that conclusion.").

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: September 5, 1998.

Respectfully submitted,

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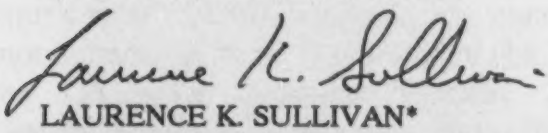

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLYDE EDWIN SEIDEL,
Petitioner-Appellee,

v.

W.A. MERKLE,
Respondent-Appellant.

No. 97-15786

D.C. No. CV-94-01621 SI-FSL

OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted
February 9, 1998 - San Francisco, California

Filed July 20, 1998

Before: Dorothy W. Nelson, Stephen Reinhardt, and
Charles Wiggins, Circuit Judges.

Opinion by Judge D.W. Nelson

SUMMARY

CRIMINAL LAW AND PROCEDURE/RIGHT TO COUNSEL

The court of appeals affirmed a judgment of the district court. The court held that a federal habeas corpus petitioner does not have to establish cause and prejudice for the district court to conduct an evidentiary hearing.

In a fight with another man, appellee Clyde Seidel inflicted a mortal stab wound on his adversary. Seidel was arrested and gave a statement to police explaining that he had drawn his knife only after the victim punched him in the head. According to Seidel, the victim fell on the knife during the struggle.

Seidel's attorney relied on a theory of self-defense. While the attorney knew that Seidel had symptoms of mental illness and was taking medication for episodes of anger and blackouts, he conducted no investigation to determine whether Seidel's psychiatric condition offered another line of defense. At trial, Seidel did not testify. Defense counsel requested and received jury instructions on voluntary and involuntary manslaughter, but did not present any evidence on Seidel's mental state bearing on the issue of malice. The jury convicted Seidel of second-degree murder.

On state habeas corpus, Seidel's new counsel alleged that the record contained evidence that Seidel suffered from post-traumatic stress disorder (PTSD). The trial court appointed Dr. Paul Koller to examine Seidel. Dr. Koller concluded that Seidel manifested several clear symptoms of PTSD, and that he had residual brain damage and long-term memory impairment. However, the court denied Seidel's petition. The California appellate courts upheld the trial court's decision.

Seidel sought federal habeas corpus relief. The district court determined that Seidel had stated a cognizable claim of ineffective assistance of counsel, issued an order to show cause, and ordered an evidentiary hearing sua sponte.

Citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), the State of California moved for reconsideration. The district court denied the motion, concluding that Seidel did not have to establish cause for failing to develop the facts in state court, and actual prejudice from that failure, for the court to conduct an evidentiary hearing.

Tamayo-Reyes held that on federal habeas corpus, a district court is required to conduct an evidentiary hearing only if the petitioner shows cause for his failure to develop the facts in state-court proceedings and resulting prejudice. This holding partly overruled and narrowed the Supreme Court's decision in *Townsend v. Sain*, 372 U.S. 293 (1963), which held that federal courts have plenary power of inquiry in habeas corpus cases when the petitioner alleges facts which, if proved, would entitle him to relief. The *Townsend* court listed six situations in which an evidentiary hearing is mandatory, and stated that in all other cases when material facts are in dispute, an evidentiary hearing is discretionary.

A magistrate judge (MJ) conducted an evidentiary hearing and concluded that trial counsel was constitutionally ineffective for failing to present a potentially meritorious defense of mental incapacity. The district court adopted the MJ's findings of facts and conclusions of law, ruling that defense counsel's failure to present any evidence regarding Seidel's mental health in support of a manslaughter finding amounted to ineffective legal assistance. The State appealed.

[1] A federal district judge has the power, constrained only by sound discretion, to receive evidence bearing on a habeas applicant's claim. The Supreme Court has consistently upheld the

power of federal courts on habeas corpus to take evidence relevant to such claims. [2] *Townsend* announced six circumstances under which a federal court must grant an evidentiary hearing to a habeas applicant. [3] *Tamayo-Reyes* did not affect Townsend's holding with respect to the district court's broad authority to consider any evidence relevant to a habeas petitioner's claim. The district court properly exercised its power to receive evidence and try the facts anew, given that Seidel alleged facts which, if proved, would entitle him to relief.

[4] Seidel had to demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defense. [5] The ultimate question was whether counsel's representation fell below an objective standard of reasonableness.

[6] In general, counsel has a duty to make reasonable investigations, or to make a reasonable decision that makes particular investigations unnecessary. In this case, there were abundant signs that Seidel suffered from mental illness. Nevertheless, trial counsel failed to conduct any investigation into his client's psychiatric history and therefore neglected to pursue a potentially successful defense. [7] In addition, there was evidence that counsel actually was aware of the mental problems that his client suffered. [8] Counsel's disregard for evidence that pointed to a potentially fruitful trial strategy could not be described as anything short of deficient representation.

[9] There was no evidence that trial counsel was misled because Seidel misrepresented the source of his illness or exaggerated its effects. Counsel had ample notice of Seidel's condition from objective sources. Counsel's failure to investigate could not be construed as a trial tactic.

[10] While Seidel's confession to the police was consistent with a theory of self-defense, there was nothing in it that precluded a second defense based on Seidel's psychiatric problems. The State

was unable to explain why self-defense and a defense based on mental illness were mutually exclusive under the circumstances. The two defenses were likely to have been complimentary: Seidel's fear for his own safety during the fight could have been exacerbated by his psychological history of multiple trauma.

[11] To establish prejudice, Seidel had to show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is one sufficient to undermine confidence in the outcome. It was reasonably probable that the outcome of Seidel's trial would have been different had counsel conducted a minimal investigation into Seidel's apparent psychiatric impairment.

[12] The jury found that Seidel's use of a knife constituted an intentional act that supplied the element of malice necessary to convict a defendant of second-degree murder under California law. There was a reasonable probability that if a defense of mental illness had been presented, the jury would not have found the existence of malice.

[13] There was no indication that Dr. Koller's diagnosis was influenced by Seidel's alleged exaggerations. Because Dr. Koller's assessment seemed to have been influenced by a realistic understanding of Seidel's personality and history, it was doubtful that Dr. Koller's opinion would have been severely undermined on cross-examination. A mental illness defense would not have been a wasted effort.

[14] In view of counsel's constitutionally ineffective performance and the high likelihood that it had a prejudicial effect on the defense, confidence in the outcome of Seidel's trial was considerably undermined.

COUNSEL

René A. Chacón, Deputy Attorney General, San Francisco, California, for the respondent-appellant.

Arthur Pirelli, San Francisco, California, for the petitioner-appellee.

OPINION

D.W. NELSON, Circuit Judge:

Clyde Edwin Seidel, a California state prisoner, is serving a sentence of sixteen years to life for his second-degree murder conviction. Seidel petitioned the District Court for the Northern District of California for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On reviewing the record from the state court proceedings in connection with the petition, the district court found that Seidel had stated a cognizable claim of ineffective assistance of counsel and issued an Order to Show Cause why a writ should not issue. The district court then *sua sponte* ordered an evidentiary hearing on Seidel's allegations of ineffective assistance of counsel, referring the matter to a federal magistrate judge. The district court later adopted the magistrate judge's finding of constitutionally deficient representation and granted Seidel's federal habeas petition.

The State of California now appeals, arguing (1) that the district court erred in holding an evidentiary hearing without first requiring Seidel to demonstrate cause and prejudice; and (2) that even if the evidentiary hearing was properly held, the district court erred in concluding that Seidel received ineffective assistance of counsel at trial.

We have jurisdiction over this timely appeal under 28

U.S.C. §§ 1291 and 2253, and we affirm the district court's order granting Seidel's petition for a writ of habeas corpus.

FACTUAL AND PROCEDURAL BACKGROUND

The facts surrounding the underlying second-degree murder conviction are not in dispute. On June 1, 1990, early in the evening, Seidel went to visit his girlfriend, Angela Davis, at the trailer park where she lived. Approximately thirty minutes after Seidel arrived, Davis's neighbor, Dorina Canfield, appeared at Davis's trailer and explained that she and her husband, Jade Bucholz, had just had an argument. Canfield believed that she was in danger of harm from Bucholz, so Davis and Seidel encouraged her to stay with them in Davis's trailer for the evening.

Later that evening, Seidel decided to drive to the grocery store in his pick-up truck, accompanied by Canfield and by Davis's two daughters. As Seidel started his truck, Bucholz approached the truck's window on the passenger side, where Canfield was sitting, and husband and wife began screaming and fighting.

Seeing that Bucholz was "jerking" at the passenger door, Seidel got out of his truck and approached Bucholz. Bucholz kicked Seidel, who was holding a knife in his hand, and took a few swings in his direction. Seidel then attacked Bucholz, and the two fell to the ground in a struggle. During the fight, Bucholz received a mortal wound in the chest. Seidel fled the scene in his truck, and was apprehended by local law enforcement later that night. He was arrested and eventually charged with one count of murder in violation of California Penal Code § 187.

The day after the murder, Seidel gave a statement to the police explaining that he had removed his knife from its sheath only after Bucholz punched him in the head. Seidel reported that he was "scared for his life," and "never meant to hurt him . . .

never meant to cut him at all." In Seidel's words, Bucholz "fell on the knife" during their struggle.

At trial in Humboldt County Superior Court, Seidel did not take the stand. His counsel relied solely on a theory of self-defense. On November 22, 1991, a jury convicted Seidel of second-degree murder, and the trial court sentenced him to a term of sixteen years to life in prison.

Seidel's trial counsel petitioned the court for a new trial or, in the alternative, a modification of his conviction to a lesser crime. The trial court denied both motions. Seidel then requested and was assigned new counsel based on his claim of ineffective representation at trial. On the advice of new counsel, Seidel filed a writ of habeas corpus in state court, alleging that he had been deprived of a meritorious defense due to trial counsel's ineffectiveness. The state habeas petition referenced the fact that the record contained evidence that Seidel suffered from Post-Traumatic Stress Disorder ("PTSD").

The state trial court subsequently granted Seidel's motion for the appointment of an expert psychologist to examine him. After a three-hour clinical interview during which multiple tests were administered, Dr. Paul Koller concluded that Seidel "manifests several clear symptoms" of PTSD. Dr. Koller also found that Seidel shows "some residual brain damage and long-term memory impairment."

After reviewing Dr. Koller's report, the state trial court nevertheless denied Seidel's habeas petition. On April 19, 1993, the California Court of Appeal affirmed Seidel's conviction, and the California Supreme Court denied Seidel's petition for review a few months later.

On March 10, 1994, Seidel filed a federal habeas petition under 28 U.S.C. § 2254 in the District Court for the Northern

District of California. In an order dated February 2, 1995, Judge Eugene F. Lynch found that Seidel had stated a cognizable ineffective assistance claim and issued an Order to Show Cause why a writ should not issue. On October 11, 1995, Judge Lynch *sua sponte* ordered an evidentiary hearing on Seidel's allegations of ineffective assistance of state trial counsel. The State moved for reconsideration, arguing that under the Supreme Court's decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), Seidel was required to demonstrate both cause for his failure to develop the facts in state court and actual prejudice resulting from that failure. Judge Lynch denied the State's motion for reconsideration.

On November 15, 1996, United States Magistrate Judge F. Steele Langford conducted an evidentiary hearing at which four witnesses testified, including Seidel's trial counsel and Seidel himself. Magistrate Judge Langford concluded that trial counsel had "conducted no investigation whatsoever of Petitioner's mental state and PTSD. . . . despite the fact he was put on notice." Judge Langford further found that trial counsel was constitutionally ineffective under the standards established in *Strickland v. Washington*, 466 U.S. 668 (1984), as "[t]here is no evidence that trial counsel's failure to present a potentially meritorious defense was strategy, rather than neglect."

On February 11, 1997, United States District Court Judge Susan Illston issued an order adopting Magistrate Judge Langford's Findings of Fact and Conclusions of Law. On March 26, 1997, Judge Illston granted Seidel's habeas petition on the basis of trial counsel's ineffective assistance. Judge Illston concluded, "Counsel's failure to pursue any investigation into Seidel's psychiatric background and subsequent failure to present any evidence to the jury regarding his mental health in support of a finding of manslaughter denied petitioner effective assistance of counsel." The State filed a timely appeal.

STANDARD OF REVIEW

We review a district court's decision to grant a state prisoner's petition for a writ of habeas corpus de novo. *Dyer v. Calderon*, 122 F.3d 720, 726 (9th Cir. 1997). A claim of ineffective assistance of counsel presents a mixed question of fact and law and also receives de novo review. *Sanders v. Ratelle*, 21 F.3d 1446, 1451 (9th Cir. 1994). Of course, a federal district court's factual findings and its adoption of the findings of a federal magistrate judge are reviewed for clear error. *Id.* at 1452.

ANALYSIS

I. *Evidentiary Hearing*

The State maintains that the district court erred in granting Seidel an evidentiary hearing without first requiring him to demonstrate cause for his failure to develop the facts in state court and actual prejudice resulting from that failure. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992). For the reasons stated below, we reject the State's argument.

[1] In our view, it is well-established that a federal district judge has "the power, constrained only by his sound discretion, to receive evidence bearing upon the [habeas] applicant's constitutional claim." *Townsend v. Sain*, 372 U.S. 293, 318 (1963). Having considered the history, development, and purpose of the writ, the *Townsend* Court determined that the Supreme Court "has consistently upheld the power of the federal courts on habeas corpus to take evidence relevant to claims of such detention." *Id.* at 311. The Court in *Townsend* explained:

> [A] narrow view of the hearing power would totally subvert Congress' specific aim . . . of affording state prisoners a forum in the federal trial courts for the determination of claims of detention in violation of the Constitution. The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.

Id. at 312.

[2] After describing the district court's "plenary" power to hear evidence relevant to a habeas claim, the *Townsend* Court turned "to the considerations which in certain cases may make exercise of that power mandatory." *Id.* The Court announced the general rule that a federal evidentiary hearing is required if the habeas applicant did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding. *Id.* The *Townsend* Court then particularized its rule for purposes of guidance, identifying six specific circumstances under which a federal court must grant an evidentiary hearing to a habeas applicant. *Id.* at 313.

The *Townsend* Court's ruling could not be more clear. The Court carefully distinguished between its discussion of when a federal court in a habeas proceeding is authorized to hear additional evidence and its discussion of when a federal court is required to hear additional evidence. In fact, at the close of its decision, the *Townsend* Court added, for the sake of clarity, that "[t]he purpose of the [six-part] test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge." *Id.* at 318.

In spite of the Court's lucid decision in *Townsend*, the State argues that the district court below erred in holding an evidentiary hearing because Seidel did not demonstrate "cause and prejudice," as required by the Supreme Court's ruling in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). The issue before the *Tamayo-Reyes* Court, however, was not whether the district court was authorized to hold an evidentiary hearing, but whether the district court was required to order an evidentiary hearing under the circumstances at bar. The *Tamayo-Reyes* Court held that a habeas applicant only "is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure." *Id.* at 11. The *Tamayo-Reyes* Court's decision thereby overruled and significantly narrowed the fifth part of the six-part *Townsend* test for determining when an evidentiary hearing must be held. *See id.* at 5.

[3] Contrary to what the State argues here, *Tamayo-Reyes* did not affect *Townsend*'s holding with respect to the district court's broad authority to consider any evidence relevant to a federal habeas petitioner's claim. *See Tamayo-Reyes*, 504 U.S. at 23 (O'Connor, J., dissenting) ("[T]he district courts . . . still possess the discretion, which has not been removed by today's opinion, to hold hearings even where they are not mandatory."). In fact, this Court has specifically recognized that *Tamayo-Reyes* only modified the conditions under which an evidentiary hearing is required. *See Chacon v. Wood*, 36 F.3d 1459, 1465-66 (9th Cir. 1994) ("In *Tamayo-Reyes*, the Supreme Court overruled *Townsend* in part. Specifically, it held that a hearing is not mandatory under *Townsend*'s *fifth* circumstance . . . unless the petitioner can show cause for failing to develop the material facts in state court and prejudice resulting therefrom."). Accordingly, we hold that the district court below properly exercised its "power to receive evidence and try the facts anew," given that Seidel "allege[d] facts which, if proved, would entitle him to relief." *Townsend*,372 U.S. at 312.

Four other circuits have considered this issue and appear to be evenly split in their results. *See Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993); *Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1062 (1998); *Clemmons v. Delo*, 124 F.3d 944, 951-52 (8th Cir. 1997); *Mathis v. Zant*, 975 F.2d 1493 (11th Cir. 1992).

Two, the Eleventh and Sixth Circuits, concluded that *Tamayo-Reyes* is not exclusively applicable to the determination of when district courts are *required* to hold hearings in the context of habeas corpus proceedings, but also imposes affirmative limits on the federal courts' ability to hold evidentiary hearings at their discretion. *See Mitchell*, 114 F.3d at 577 (holding that "a district court abuses its discretion by ordering [an evidentiary] hearing without first requiring the petitioner to make the requisite showing [of cause and prejudice]"); *Mathis*, 975 F.2d at 1496-97 (reversing on the ground that the district court failed to require the petitioner to demonstrate cause and prejudice before it *sua sponte* ordered an evidentiary hearing).

The other two circuits, the Second and the Eighth, reached the opposite conclusion, reasoning that *Tamayo-Reyes* does not affect the discretion of the federal courts to hold evidentiary hearings. *See Pagan*, 984 F.2d at 64 ("*Townsend* also made clear that a District Court retained the power to hold a hearing even though one was not required. . . . This aspect of *Townsend* remains the law."); *Clemmons*, 124 F.3d at 952 (emphasizing that *Tamayo-Reyes* "addresses only the circumstances under which an evidentiary hearing is *required*") (emphasis in original).

For the reasons stated above, we are convinced that the position adopted by the Second and Eighth Circuits is most consistent with Supreme Court precedent.[1]

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1. Because we conclude that the district court acted within its discretion in ordering an evidentiary hearing, we do not consider

II. *Ineffective Assistance*

The State argues that even if the district court properly held an evidentiary hearing on Seidel's claim of ineffective assistance of counsel, the district court erred in granting Seidel habeas relief.

[4] In deciding whether Seidel was deprived of his Sixth Amendment right to counsel, we apply the two-tier test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). According to *Strickland*, Seidel must demonstrate (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. *Id.* at 687; *see also Dyer v. Calderon*, 122 F.3d 720, 732 (9th Cir. 1997).

A. *Performance*

[5] In reviewing the performance of Seidel's trial attorney, the ultimate question is whether counsel's "representation fell below an objective standard of reasonableness." *Bonin v. Calderon*, 59 F.3d 815, 833 (9th Cir. 1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Bearing in mind that "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, we nevertheless hold that counsel's conduct in this case fell outside the wide range of professionally competent assistance, *see id.* at 690.

[6] In general, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. In the instant case, there were abundant signs in the record that Seidel suffered from mental illness. Nevertheless, trial counsel

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whether Seidel would have been entitled to relief even in the absence of the additional evidence adduced during the federal hearing. In this respect, we note that a substantial amount of evidence was presented to the state court, including Dr. Koller's psychiatric report.

failed to conduct any investigation at all into his client's psychiatric history and therefore neglected to pursue a potentially successful defense. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) ("[C]ounsel must, at a minimum, *conduct a reasonable investigation* enabling him to make informed decisions about how best to represent his client."); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) ("[C]ounsel's failure to pursue the possibility of establishing [his client's] mental instability constituted deficient performance.").

It was clear from the evidence available to counsel at the time of trial that Seidel has an extensive history of mental problems. The pre-trial record included the following factual items: (1) Seidel had been treated with medication by a prison psychiatrist while awaiting trial; (2) Seidel's jail medical record indicated that he had been treated at a V.A. hospital for a mental disorder; and (3) Seidel's Own Recognizance Report, prepared for his bail hearing, documented prior hospitalization at a V.A. hospital for symptoms related to his mental condition.

[7] In addition to the evidence in the pre-trial record that should have alerted trial counsel to the possibility of using Seidel's mental illness as a defense, there is also evidence in the record that counsel actually was aware of the mental problems that his client suffered. Seidel testified at the federal evidentiary hearing that he had informed counsel about the symptoms related to his mental condition. *See Strickland*, 466 U.S. at 691 ("[I]nquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions . . . ."). Counsel's own handwritten notes corroborate Seidel's testimony: Notes from a client interview with Seidel on July 23, 1990, less than two months after the murder, indicate that Seidel told counsel that he walked away from Bucholz after mortally wounding him because he was taking medication from the V.A. hospital and experiences "anger fits and black[] out[s]." In addition, as evidenced by counsel's own notes, counsel had been informed that the prison mental health department was arranging to obtain

medication for Seidel while he remained in custody. In spite of these telltale signs that counsel knew of his client's psychiatric troubles, counsel stated in a letter dated five months after Seidel's conviction that "the evidence [did not] suggest that [Seidel] had any mental problems."

[8] Although trial counsel had both actual and constructive notice of Seidel's mental status, he conducted no investigation to ascertain the extent or possible ramifications of his client's psychiatric impairment. Counsel did not obtain Seidel's military, prison, or medical records, which obviously would have provided a full account of his mental health history. He failed to interview any witnesses regarding Seidel's mental state. Counsel never requested that any mental or psychiatric evaluations be performed on his client to assess his condition. In sum, counsel failed to conduct any research at all into the possibility of presenting a defense related to his client's obviously impaired mental state. Counsel's disregard for conspicuous pieces of evidence that pointed to a potentially fruitful trial strategy cannot be described as anything short of defective representation.

[9] Our conclusion that counsel was ineffective for purposes of *Strickland* is not affected by the possibility that Seidel misrepresented the source of his illness or exaggerated its effects in conversations with post-conviction counsel. There is no evidence that trial counsel was misled and there is thus no merit to the State's argument that trial counsel's decision not to pursue mental illness as a defense was a strategic one based on Seidel's apparently untrustworthy accounts of his condition. The fact remains that counsel had ample notice of Seidel's condition from objective sources, yet failed to conduct even a minimal investigation in order to make an informed decision regarding the possibility of a defense based on Seidel's mental illness. *See Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (holding that an attorney's choice to eliminate a certain defense cannot be viewed as "strategic" where counsel "failed to conduct even the

minimal investigation that would have enabled him to come to an informed decision"); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (holding that counsel's failure to investigate client's mental condition "cannot be construed as a trial tactic").

[10] Second, the State argues that Seidel's taped confession to the police made self-defense the only feasible direction of argument. We disagree. While the police statement, indicating that Seidel was "scared for [his] life" at the time of the incident and only attacked the victim after receiving a punch to the head, is consistent with a theory of self-defense, there is nothing in the statement that precluded a second defense based on Seidel's psychiatric problems. The State has been unable to explain why self-defense and a defense based on mental illness were mutually exclusive under the existing circumstances. Indeed, the two defenses were quite likely to be complementary: Seidel's fear for his own safety during the fight with Bucholz could have been exacerbated by his psychological history of multiple trauma. As Dr. Paul Koller, the expert psychologist appointed by the state trial court to examine Seidel, explained:

> Typically, such a combination of multiple traumas tends to leave victims excessively fearful and psychologically primed to over-react to perceived threats . . . It is thus quite possible that the combination of situational factors, Mr. Seidel's PTSD, and his organic brain damage helped create an excessive fear for his well-being and subsequent impulsive, poorly thought out over-reaction with the knife.

Dr. Koller's report simply confirms that trial counsel's "strategic" decision to rely exclusively on a theory of self-defense could not have been the product of reasonable professional judgment.

B. *Prejudice*

[11] Trial counsel's deficient performance alone "does not warrant setting aside the judgment . . . if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. In order to establish prejudice, Seidel "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* There is little question in our minds that it is reasonably probable that the outcome of Seidel's trial would have been different had counsel conducted a minimal investigation into Seidel's apparent psychiatric impairment.

[12] The jury in this case found that Seidel's use of a knife constituted an intentional act that supplied the element of malice necessary to convict a defendant of second-degree murder under California law. There is a reasonable probability that if a defense of mental illness had been presented, the jury would not have found the existence of malice. *See People v. Swain*,909 P.2d 994, 1001 (Cal. 1996) ("[M]alice [can] be rebutted by a showing that defendant's mental capacity was reduced by mental illness [or] mental defect . . . .") (internal quotations and citations omitted). As the district court below found, "A defense of imperfect self-defense based on the facts of the case, coupled with petitioner's mental state at the time of the fight, the PTSD symptoms, and the organic brain damage would have eliminated the element of malice." We agree with the district court that if counsel had introduced Dr. Koller's evaluation at trial, which documented both "clear symptoms of PTSD" and "chronic brain damage," along with other evidence in the record of Seidel's mental illness, the jury in all likelihood would have returned a verdict of manslaughter instead of murder. *Compare* Cal. Penal Code § 187(a) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."), *with* Cal. Penal Code § 192 ("Manslaughter is the unlawful killing of a human being without malice."). It is

particularly curious that counsel requested and received jury instructions for both voluntary and involuntary manslaughter, but failed to present any evidence or argument to support a manslaughter finding. Although trial counsel relied exclusively on a theory of self-defense, Seidel never testified and there was no other evidence presented that was relevant to Seidel's mental state. Accordingly, evidence demonstrating Seidel's mental condition would have played a significant role in establishing the requisite fear for purposes of self-defense.

[13] The State challenges the existence of a reasonable probability that a mental illness defense would have succeeded at trial. The State again focuses on Seidel's supposed lies concerning, *inter alia*, his POW status. The State insists that at trial, the prosecution "would have vigorously cross-examined Seidel's psychologist over Seidel's many misrepresentations and would have uncovered his false assertion of POW status." The State's argument is without merit. There is simply no indication that Dr. Koller's diagnosis was influenced by any of the alleged exaggerations. Dr. Koller's report contains no mention of POW status, and in it he expressly recognized that Seidel had "lost much credibility as an historian and witness" as result of his "lies or omissions," which may have been attributable to his "chronic brain damage." Because Dr. Koller's assessment seems to have been informed by a realistic understanding of Seidel's personality and history, it is doubtful that Dr. Koller's professional opinion would have been severely undermined on cross-examination. We therefore cannot agree with the State's contention that a mental illness defense would have been a wasted effort.

[14] In view of trial counsel's constitutionally ineffective performance and the high likelihood that it had a prejudicial effect on the defense, our confidence in the outcome of Seidel's trial is considerably undermined.

CONCLUSION

For the reasons stated above, we AFFIRM the district court's order granting Seidel's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CLYDE EDWIN SEIDEL,
Petitioner-Appellee,

v.

W.A. MERKLE,
Respondent-Appellant.

No. 94-1621 SI

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Filed March 27, 1997

Petitioner Clyde Seidel, a state prisoner, filed an application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 alleging ineffective assistance of his trial counsel on March 10, 1994. Having carefully considered the papers submitted by the parties and the findings of fact and law by Chief Magistrate Judge F. Steele Langford, the Court hereby GRANTS the petition for a Writ of Habeas Corpus.

BACKGROUND

Petitioner Clyde Seidel stabbed a man in the course of a drunken fight; the victim, Jade Bucholz, subsequently died. Seidel was charged by the Humboldt County District Attorney with one count of murder in violation of California Penal Code § 187 on July 11, 1990. Seidel was convicted by a jury of second degree murder in Humboldt County Superior Court and on November 22, 1991, was sentenced to sixteen years to life in state prison, including a one-year enhancement for use of a deadly weapon.

The trial court instructed the jury on: (1) voluntary manslaughter based on the heat of passion or an honest but unreasonable belief in self-defense, (2) involuntary manslaughter, and (3) pure self-defense. However, petitioner's counsel only made arguments for pure self-defense. Petitioner did not take the stand to testify on his own behalf.[1]

After the verdict, trial counsel petitioned the trial court for a new trial or in the alternative a modification of his conviction to a lesser crime. The trial court denied those motions. Seidel then requested and was assigned new counsel based on his claim of ineffective representation. Under advice of new counsel, Seidel filed a writ of habeas corpus and alternatively for a new trial or reduction of sentence. Seidel argued that he was deprived of a fair trial through the loss of a meritorious defense. The trial court granted petitioner's motion for appointment of a psychologist, Dr. Koller, to examine him. Dr. Koller's report of his examination of petitioner revealed that Seidel suffered from several symptoms of Post Traumatic Stress Disorder ("PTSD") due to his combat

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1. In post-trial declarations, several members of the jury indicated that they did in fact consider Seidel's decision not to testify as evidence of his guilt. *See* Lynch Order at 3.

experiences in Vietnam as well as other personal trauma.[2/] Petitioner also suffers from organic brain damage.

The trial court denied the habeas petition and the motion for a new trial. The State Court of Appeal affirmed Seidel's conviction on April 19, 1993. On July 21, 1993, the California Supreme Court denied review of petitioner's claims. Seidel subsequently filed a petition for Writ of Habeas Corpus with this Court pursuant to 28 U.S.C. § 2254. In an order dated February 2, 1995, District Judge Eugene F. Lynch found that petitioner had stated a cognizable claim of ineffective assistance of counsel and issued an Order to Show Cause why a writ should not issue. On November 15, 1996, an evidentiary hearing on petitioner's allegations of ineffective assistance of counsel was held by Chief Magistrate Judge F. Steele Langford. Judge Langford issued his findings of fact and conclusions of law on December 27, 1996.

DISCUSSION

A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance but *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.*

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2. Dr. Koller's report also states, "It has been established that Mr. Seidel was well aware of the aggressive nature of the victim. It is thus quite possible that the combination of situational factors, Mr. Seidel's PTSD, and his organic brain damage, helped create an excessive fear for his well-being and subsequent impulsive, poorly thought out over-reaction with the knife."

A. Deficient Performance by Counsel

First, the defendant must demonstrate that counsel's performance was deficient. In particular, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. The defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. Judicial scrutiny of counsel's performance must be highly deferential, however, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.*; *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). A defendant can make out a claim of ineffective assistance of counsel only by pointing to specific errors made by trial counsel. *United States v Cronic*, 466 U.S. 648, 666 (1984); *Smith v. Ylst*, 826 F.2d at 872, 875 (1987).

A claim of negligence in conducting pretrial investigation can form the basis for a claim of ineffective assistance. *United States v. Tucker*, 716 F.2d 576 (9th Cir. 1983); *Hines v. Enomoto*, 658 F.2d 667, 676 (9th Cir. 1981). Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *See Sanders*, 21 F.3d at 1457 (failure to investigate which led to an uninformed decision not to call witness who had admitted to committing crime was not a strategic decision); *United States v. Burrows*, 872 F.2d 915, 918 (9th Cir. 1989) (counsel's performance deficient where counsel failed to investigate possibility of mental illness defense); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (failure to investigate possibility of mental impairment cannot be construed as trial tactic where counsel failed to review relevant documents); *Deutscher v. Whitley*, 946 F.2d 1443 (9th Cir. 1991) (counsel's failure to challenge aggravating factors and to present mitigating evidence for client who suffered from pathological intoxication and organic brain damage resulted in fundamental miscarriage of justice). The failure to investigate a defense may not be ineffective assistance where it was due to the defendant's failure to inform the attorney of relevant facts or the defendant's insistence on a

particular course of action. *See Langford v. Day*, No. 95-99001, slip op. 15999, 16013-16 (9th Cir. Dec. 24, 1996).

In the instant case, trial counsel was aware of petitioner's mental state from his interview with Seidel[3] and was alerted to significant facts which should have caused trial counsel to investigate a possible defense related to petitioner's mental health.[4] Petitioner reported his nightmares about his Vietnam experience to trial counsel. In addition, it was not petitioner's duty to envision possible defenses based on his PTSD symptoms.

A difference of opinion as to trial tactics does not constitute denial of effective assistance, *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir.), *cert. denied sub. nom.*, *Dondich v. United States*, 454 U.S. 1127 (1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available. *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). Tactical decisions of trial counsel deserve deference when: (1) counsel in fact bases trial conduct on strategic considerations; (2) counsel makes an informed decision based upon investigation; and (3) the decision appears reasonable under the circumstances. *Thompson v.*

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3. Trial counsel's own handwritten notes from an interview with petitioner on July 23, 1990 indicate that on the date of the incident petitioner stated that he attempted to walk away from the victim because he was taking medication from the V.A. hospital and gets "anger fits and blacks out." Counsel's notes also indicate that counsel was aware that the mental health department was going to get petitioner's medications for him locally while he was in custody.

4. Records existed at the time of trial that: (1) petitioner had been seen by a psychiatrist while awaiting trial in the Humboldt County Jail, (2) petitioner was taking medication prescribed by a psychiatrist, (3) Psychiatric Progress Notes in petitioner's jail medical record indicate that he was treated at the Roseburg V.A. hospital "for what sounds like PTSD", (4) the O.R. Bail Report prepared for petitioner's bail hearing documents prior hospitalization at the Roseburg V.A. for having "bad dreams of his Vietnam days", and (5) an entry in the jail medical record by a crisis worker refers to a prior psychiatric hospitalization.

Calderon, 86 F.3d 1509, 1515-16 (9th Cir. 1996). Nevertheless, the label of "trial strategy" does not automatically immunize an attorney's performance from Sixth Amendment challenges. *United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996).

Counsel's decision to argue only for reasonable self-defense would have been an acceptable tactical decision only if counsel had investigated petitioner's PTSD. In petitioner's case, however, counsel interviewed no witnesses regarding Seidel's mental history or state of mind, did no research or investigation regarding a mental defense in general or PTSD in particular, and made no argument for voluntary manslaughter or imperfect self-defense. Counsel was not even in a position to make a strategic decision, as he had done no investigation. Counsel's failure to not present evidence of petitioner's PTSD or mental health background was unreasonable in light of the information that was available to counsel at the time of trial. Therefore, the Court must construe counsel's decision not to argue for manslaughter or imperfect self-defense not as a tactical decision but instead as an error of constitutional dimension.

B. Prejudice

Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, i.e., a trial whose result is reliable. *Strickland*, 466 U.S. at 688. The test for prejudice is not outcome-determinative. The defendant need not show that the deficient conduct more likely than not altered the outcome of the case. *Id.* at 693. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694.

In the instant case, the jury found that petitioner's use of a knife provided the malice necessary to find the petitioner guilty of second degree murder. A defense of imperfect self-defense based on the facts of the case, coupled with petitioner's mental

state at the time of the fight, the PTSD symptoms, and the organic brain damage would have eliminated the element of malice. Because counsel failed to call any experts or the petitioner to testify about petitioner's medical history meant that there was no evidence to support the jury instructions for voluntary or involuntary manslaughter. There was simply no evidence presented to the jury that Seidel acted in an honest but unreasonable manner to support a verdict of manslaughter. There is a reasonable probability, therefore, that this evidence would have resulted in a conviction of manslaughter. This court finds that there is a reasonable probability that the outcome of petitioner's trial would have been different had the jury known of his PTSD. Accordingly, petitioner has shown the element of prejudice necessary to succeed on a claim for ineffective assistance of trial counsel.

Counsel's failure to pursue any investigation into Seidel's psychiatric background and subsequent failure to present any evidence to the jury regarding his mental health in support of a finding of manslaughter denied petitioner effective assistance of counsel. This court finds that but for the conduct of petitioner's trial counsel, the outcome of Seidel's trial would have been different. Therefore, Seidel's petition for a Writ of Habeas Corpus is granted.

CONCLUSION

For the aforementioned reasons, and for good cause shown, the petition for a Writ of Habeas Corpus is hereby GRANTED. Respondent is ordered to release petitioner within 60 days of this order. During that time, Humboldt County may elect to re-try Seidel.

IT IS SO ORDERED.

Dated: March 26, 1997

SUSAN ILLSTON
United States District Judge

98-433

Supreme Court, U.S.
FILED
DEC 2 1996
CLERK

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SUPREME COURT OF THE

UNITED STATES

W. A. MERKLE, Warden
Petitioner,

V.

CLYDE E. SEIDEL,
Respondent.

No. 98-0433

MOTION
TO
PROCEED IN FORMA PAUPERIS

The Respondent/Defendant, by and through his appointed counsel, Arthur Pirelli, hereby moves for leave to proceed *in forma pauperis* as counsel was appointed in the United States district court and the United States court of appeals under the Criminal Justice Act of 1964, 18 U.S.C. 3006A.

December 1, 1998

Respectfully Submitted,

Arthur Pirelli

Arthur Pirelli
Attorney for Respondent
CLYDE SEIDEL

11 pp

CERTIFICATE OF SERVICE

I am employed in the city and county of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 507 Polk Street, Suite 320, San Francisco, California, 94102.

On December 2, 1998 a copy of the Brief In Opposition To Petition For Writ Of Certiorari and Motion To Proceed In Forma Pauperis was served by placing in the United States mail at San Francisco, California in a post-paid envelope, sealed and addressed to the party listed below:

Rene A. Chacon
Deputy Attorney General
Laurence K. Sullivan
Supervising Deputy Attorney General
Counsel of Record
50 Fremont Street, Suite 300
San Francisco CA. 94105-2239

I declare under penalty of perjury that the foregoing is true and correct. Executed this 2nd day of December, 1998 at San Francisco, California.

Arthur Pirelli

NO. 98-0433

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

W. A. MERKLE, Warden, Petitioner

v.

CLYDE EDWIN SEIDEL, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

QUESTION PRESENTED

Does the holding of ***Keeney v. Tamayo-Reyes***, 504 U.S. 1 (1992), preclude an evidentiary hearing in a habeas corpus proceeding, absent a showing of cause and prejudice from failure to develop a material fact in the state court proceedings ?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:	PAGE
Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)	1, 2,3,4
Mathis v. Zant, 975 F. 2d 1493 (11th Cir. 1992)	2,3
Mitchell v. Rees, 114 F. 3d 571 (6th Cir. 1997)	2,3
Townsend v. Sain, 372 U.S. 293 (1963)	3

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent agrees with the Statement of the Case submitted by Petitioner with the following exceptions :

1. In granting the petition for a writ of habeas corpus on March 27, 1997, the district court relied not only on the evidence from the evidentiary hearing but the court also "carefully considered the papers submitted by the parties and the finding of facts and law by Chief Magistrate Judge F. Steele Langford."

2. In its decision of July 20, 1998, the Ninth Circuit Court of Appeal held that a federal habeas corpus petitioner does not have to establish cause and prejudice pursuant to ***Keeney v. Tamayo-Reyes*** for the district court to *exercise its discretion* and conduct an evidentiary hearing.

REASONS FOR DENYING THE WRIT

Petitioner argues that the Court of Appeals for the Ninth Circuit erred in holding that the district court properly exercised its discretion in ordering an evidentiary hearing without requiring the Respondent herein, petitioner below, to demonstrate cause and prejudice from failure to develop a material fact in the state court proceedings.

In doing so, Petitioner relies on ***Keeney v. Tamayo-Reyes***, 504 U.S. 1 (1992) arguing that ***Tamayo-Reyes*** altered the discretionary power of federal district courts to order an evidentiary hearing without requiring the habeas petitioner to demonstrate cause and prejudice for his failure to develop material facts in the state court.

The Petitioner further cites a split in the Circuits on the issue of whether or not ***Taayo-Reyes*** removed the discretion of the district court to hold an evidentiary hearing even where they are not mandatory. Petitioner points to ***Mitchell v. Rees***, 114 F. 3d 571 (6th Cir. 1997) and ***Mathis v. Zant***, 975 F. 2d 1493 (11th Cir. 1992).

There is no actual split in the Circuits on this issue, however, as the holding of this Court in ***Tamayo-Reyes*** clearly did not remove the discretion of the district court to grant an evidentiary hearing to consider any evidence relevant to a federal habeas petitioner's claim because that case addressed only when a hearing was mandatory.

In ***Mitchell v. Rees***, the 6th Circuit held that if the habeas petitioner did not develop

the record in state court he is *entitled* (emphasis added) to an evidentiary hearing only if ... Thus, the court only addressed the requirements for when a evidentiary hearing is *mandatory* and did not even address when the court can exercise its' *discretion* in granting a hearing.

With regard to ***Mathis v. Zant***, 975 F.2d 1493 (11th Cir. 1992) we would note the dissent of Judge Clark pointed out that the majority looked to case law that specifies when a district court is *required* to consider additional evidence and erroneously applied that law to determine whether or not a court *may* consider such evidence.

In addition, it is clear that ***Tamayo-Reyes*** did not remove the district court's discretion to grant an evidentiary hearing.

The Ninth Circuit, in its decision in the instant case, stated that the ruling in ***Townsend v. Sain***, 372 U.S. 293 (1963) could not be more clear in determining when a federal court in a habeas proceeding is authorized to hear additional evidence. The Court further pointed out that the ***Townsend*** Court stated that " the purpose of the [six part] test is to indicate the situations in which the holding of an evidentiary hearing is *mandatory* (emphasis added). In all other cases where the material facts are in dispute, the holding of such a hearing is in the *discretion* (emphasis added) of the district judge."

Finally, the Ninth Circuit, below, pointed out that the issue in ***Tamayo v. Reyes*** was not whether the district court was authorized to hold an evidentiary hearing, but whether the district court was required to order an evidentiary hearing. Thus, the court stated, ***Tamayo-Reyes***

did not affect the ***Townsend*** holding with respect to the district court's broad authority to consider any evidence relevant to a federal habeas petitioner's claim, citing ***Tamayo-Reyes***, 504 U.S. at 23 (O'Connor, J., dissenting stated "The district courts ... still possess the discretion, which has not been removed by today's opinion, to hold hearings even when they are not mandatory.")

CONCLUSION

-This case does not merit further review by this Court. For the foregoing reasons the Petition should be denied.

Dated: December 1, 1998

Respectfully Submitted,

Arthur Pirelli

ARTHUR PIRELLI
Counsel for Respondent
CLYDE EDWIN SEIDEL

(3)

COPY

No. 98-433

Supreme Court, U.S.
FILED
DEC 16 1998
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

W. A. MERKLE, Warden, *Petitioner*,

v.

CLYDE EDWIN SEIDEL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state inmate receive a federal evidentiary hearing on a claim of ineffective assistance of counsel and present evidence never alleged as the basis for the claim in the state court, where the state afforded the inmate a full and fair hearing on his federal claim?

2. Does a ruling by the Ninth Circuit Court of Appeals circumvent the holding of *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), relieving the state inmate from his burden to demonstrate cause and prejudice from his failure to develop a material fact in the state court proceedings?

TABLE OF CONTENTS

	Page
CERTIORARI IS NECESSARY TO RESTORE THE VIABILITY OF THIS COURT'S EXHAUSTION DOCTRINE	1
CONCLUSION	3

TABLE OF AUTHORITIES

	Page
Cases	
Clemmons v. Delo 124 F.3d 944 (8th Cir. 1997)	1
Keeney v. Tamayo-Reyes 504 U.S. 1 (1992)	1, 2
Mathis v. Zant 975 F.2d 1493 (11th Cir. 1992)	1
Mitchell v. Rees 114 F.3d 571 (6th Cir. 1997) *cert. denied*, 118 S. Ct. 1062 (1998)	1
Pagan v. Keane 984 F.2d 61 (2d Cir. 1993)	1
Seidel v. Merkle 146 F.3d 750 (9th Cir. 1998)	1
Townsend v. Sain 372 U.S. 293 (1963)	2
Weeks v. Bowersox 119 F.3d 1342 (8th Cir. 1997)	2
Statutes	
28 U.S.C. § 2254	2

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998
No. 98-433

W. A. MERKLE, Warden, *Petitioner*,

v.

CLYDE EDWIN SEIDEL, *Respondent*.

CERTIORARI IS NECESSARY TO RESTORE THE VIABILITY OF THIS COURT'S EXHAUSTION DOCTRINE

Respondent Clyde Edwin Seidel (Seidel) contends that certiorari should be denied because there is no division of authority within the circuits. The Ninth Circuit Court of Appeals adeptly recognized the contrary. *See Seidel v. Merkle*, 146 F.3d 750, 754 (9th Cir. 1998); *see also Mitchell v. Rees*, 114 F.3d 571, 577 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1062 (1998); *Clemmons v. Delo*, 124 F.3d 944, 951-52 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993); *Mathis v. Zant*, 975 F.2d 1493, 196-97 (11th Cir. 1992). Contrary to Seidel's argument, certiorari is necessary to settle the division of authority within the circuits.

Seidel fails to respond to the State's assertion that the Ninth Circuit Court of Appeals decision emasculates *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). By relieving Seidel of his obligation to demonstrate cause and prejudice for his failure to perfect his federal claim in state court, where the state afforded Seidel every opportunity to perfect that claim, the Ninth Circuit Court

of Appeals defeats *Tamayo-Reyes* and its stated concerns of finality, comity, judicial economy, exhaustion, and uniformity in governing habeas corpus principles. *See Tamayo-Reyes*, 504 U.S. at 8-10.

Here, the district court invited Seidel to marshall new facts to fortify his federal claim. Following an evidentiary hearing and with his federal claim now fortified with new facts, Seidel prevailed in the federal courts. The procedure the district court employed effectively denied the state courts the opportunity to pass on those new facts, violating the doctrine of exhaustion. Under the guise of an exercise of discretion, a district court may now relieve a state inmate from the requirement of showing cause for and prejudice from the inmate's failure to develop the material facts in the state courts before bestowing the privilege of an evidentiary hearing. Where, as here, the inmate was given every opportunity to perfect his claim before invoking the jurisdiction of the federal district court, we ask rhetorically what remains of *Keeney v. Tamayo-Reyes*?

Alternatively, if the Ninth Circuit panel decision is correct and *Tamayo-Reyes* is so limited, then the State respectfully argues that it is time that this Court revisit *Townsend v. Sain*, 372 U.S. 293 (1963), and overrule it as contrary to the habeas corpus doctrines developed in recent years.

Finally, we note that in the recent amendment of 28 U.S.C. § 2254 effected by the Antiterrorism and Effective Death Penalty Act of 1996, Congress arguably codified and narrowed this Court's *Keeney v. Tamayo-Reyes* standard. *See Weeks v. Bowersox*, 119 F.3d 1342, 1354 n. 12 (8th Cir. 1997). Thus, any misinterpretation of this Court's *Tamayo-Reyes* decision has lingering implications. The State's request that this Court grant the petition and restore the mandate of *Tamayo-Reyes* does not merely affect a handful of cases.

CONCLUSION

Accordingly, for the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: December 15, 1998.

Respectfully submitted,

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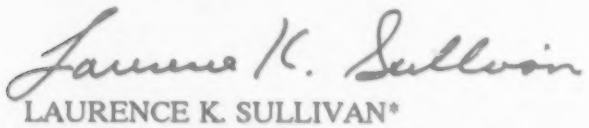

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